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October 24, 2001

**RECEIVED**

OCT 24 2001

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**BY U.S. MAIL**

Ms. Magalie Roman Salas, Secretary  
Federal Communications Commission  
455 12th Street, S.W., TW-A325  
Washington, DC 20554

Re: WT Docket No. 01-14: Notice of Ex Parte Presentation

Dear Ms. Salas:

This letter is to inform you that on October 3, 2001, Dan Pegg and Doug Byrns of Leap Wireless International and Jim Barker and William Carnell of Latham & Watkins had separate meetings with Commissioner Kevin Martin and Monica Desai and Commissioner Michael Copps and Paul Margie. The same group, plus Dr. Peter Cramton of the University of Maryland, also met with Commissioner Kathleen Abernathy and Bryan Tramont, and Chairman Michael Powell and Peter Tenhula. The subject of each of these meetings was the CMRS spectrum cap.

The parties discussed Leap's support for the spectrum cap, and reviewed information already within the administrative record. The parties also discussed the attached Power Point presentation, and the attached bullet-point outline.

Representatives of Leap stated that competition in CMRS is imperfect, that anticompetitive behavior has been evident among CMRS carriers at the margins, and that to allow consolidation within the industry would encourage and permit such behavior. They also stated that case-by-case review would impose significant burdens on the parties to every transaction (not just those tend to raise competitive issues) and on the Commission itself, and that (as we see in the antitrust context) it also would impose burdens on third parties, unrelated to the transaction. Moreover, case-by-case review is highly prone to error – errors of both overinclusion and underinclusion. Leap representatives stated that any proposal to loosen or phase out the spectrum cap must be anchored in record evidence, and that the record is devoid of justification of the proposal reported in the trade and popular press, to raise the cap to 55 MHz

Ms. Magalie Roman Salas  
October 24, 2001  
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and phase it out in 18 month – though no one suggested that this proposal is necessarily under consideration by the Commission.

The original and one copy of this letter are enclosed.

Very truly yours,

A handwritten signature in black ink, appearing to read 'W. S. Carnell', with a long horizontal flourish extending to the right.

William S. Carnell  
of LATHAM & WATKINS

cc: Chairman Michael Powell  
Commissioner Kevin Martin  
Commissioner Michael Copps  
Commissioner Kathleen Abernathy  
Monica Desai  
Paul Margie  
Bryan Tramont  
Peter Tenhula  
Thomas Sugrue  
Jeffrey Steinberg  
Lauren Kravetz  
Susan Singer

***Preserving Competition for Wireless Consumers:  
Leap Wireless International Presentation to FCC  
October, 2001***

**I. Competition Enforcement is Necessary**

**CMRS is a peculiar market, uniquely prone to anticompetitive conduct.**

- Spectrum is an essential input.
- Spectrum is scarce: none can be found (for any price) beyond 180 MHz.
- Spectrum is all held by suppliers of the end product.
- This renders CMRS uniquely prone to anticompetitive foreclosure and monopolization.

**Competition is better, but not great.**

- Average HHI in top 25 markets is 2,611. Hayes Dec. (Sprint Comments).
- Even CTIA's economists agree: HHI based on built spectrum is 1,916 – within the zone considered “highly concentrated.” Schwartz & Gale Dec. (CTIA Comments)
- Cellular duopolists retain 67 percent of subscribership. Legg Mason 2Q '01 “Scorecard”.
- Wireless penetration lags at 39 percent: offerings fail to appeal to 61 percent of Americans. *Sixth CMRS Report*.

**Incremental competition continues to produce benefits.**

- Dr. Cramton quantifies particular benefits from the “Leap effect” (a “non traditional” market entrant). “True competition comes from the bottom up”: Southwest Airlines, Leap.
  - Prices drop 37 percent. Cramton Dec.
  - Consumers enjoy 41 percent more minutes of use. Leap Comments.
  - 40 percent of Leap Customers use it as their primary phone; Seven percent unplug their landline entirely.
- Benefits also stem from entry by “traditional” carriers.
  - Inverse correlation between number of carriers and price. Cramton Dec.
  - No evidence that price decreases cease after entry by a certain number of carriers. Cramton Dec.
  - Example: AT&T one-rate plan remained at constant price through entry by the second, third and fourth competitors, but lowered prices by 14 – 22 percent after entry by a fifth (SBC). Cramton Dec.

**Whatever the state of competition might be, the fact that there are multiple carriers does not obviate the need for the spectrum cap.**

- Section 11 calls for repeal of regulations “no longer necessary” as a result of competition.
- That means that competitive forces must achieve the same end as was sought by the regulation.
- The fact that there are several carriers in most markets doesn’t prevent the excessive concentration of licenses.
- The opposite is true: it’s acknowledged that the number of carriers will decrease if spectrum cap is lifted. Sources cited in Leap Comments at 20-21.

**Even if it would prefer to cede competition enforcement to DOJ, the Commission cannot escape its duty to “avoid[] excessive concentration of licenses.”** 47 U.S.C. § 309(j)(3)(B).

## **II. Spectrum Cap is the Best Available Means of Competition Enforcement**

### **Spectrum cap focuses on the problem: spectrum transactions**

- FCC review should focus on anticompetitive results from combinations of spectrum *per se*.
- DOJ is not well suited to review of diminution in potential competition

**Spectrum cap reduces “errors” by placing the burden on the correct parties.**

### **Spectrum cap facilitates auctions and secondary markets.**

- It provides *ex ante* certainty as to eligibility, which is critical any time there are multiple bidders.
- It places the burden only on parties who propose mergers resulting in relatively high concentrations.

**The bright-line rule is easy to administer, and saves enforcement resources.**

### **DOJ is not particularly well suited to assuming this function.**

- HSR filing thresholds – now \$50 million – would insulate most pure spectrum acquisitions.
  - 80 percent of Auction #35 auctions under threshold. Auction #35 PN
  - 66 percent went for under \$10 million, so they would escape review even if aggregated in blocks of 5 or more. *Id.*
- Institutional limits on DOJ-FTC review
  - Very few second requests; fewer blocked mergers. Antitrust Division Annual Report, Cited in Leap Comments.
  - DOJ reports: “The analysis of proposed mergers has become increasingly difficult.” *Id.*
- DOJ polices actual competition, and generally does not consider potential competition.
- DOJ lacks inherent authority to block mergers.

### **The Cap allows carriers to structure their affairs coherently.**

- They can become more efficient.
- They can divest unnecessary spectrum holdings.

**Spectrum cap encourages optimal use of a scarce societal resource.**

### **III. Why Lift the Spectrum Cap Now?**

#### **No evidence that anyone is capacity constrained.**

- If they are capacity constrained, they could alleviate that through better technology.

#### **No evidence that anyone will need additional spectrum for advanced services.**

- A regular “wireless web” user requires less bandwidth in a month than a Cricket user requires in a day. Kelley Dec.
- DoCoMo I-Mode uses only 15 MHz. *Id.*
- Unclear what demand will be for advanced services.
- “3G” network equipment will make up for in increased capacity what it requires by generating additional usage. Kelley Dec.

#### **Leap has now installed and activated its first “3G” network.**

- Using very little spectrum.

#### **If the Commission is inclined to give relief based on allegations of capacity constraint or need, or based on the notion that additional spectrum will cause no additional harm, it must do so based on concrete evidence.**

- The best way to provide relief is by waiver: let the incumbents show particularized need, and then provide particularized relief.

# LEAP

**October 2001 - Presentation to FCC  
Preserving the CMRS Spectrum Cap**

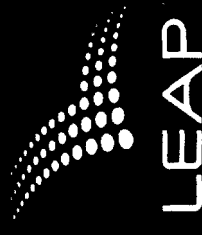
# Keep the Cap!

There are no legitimate facts to justify raising the spectrum cap

There is more need today for the Spectrum Cap than when it was first introduced

The spectrum cap ensures that four key FCC goals are met:

- Competition
- Innovation
- Spectrum efficiency
- "Cutting the Cord"





# No proven need to raise the spectrum caps

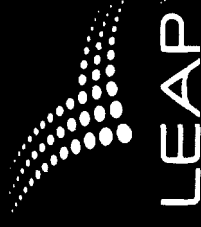
There is no evidence of capacity constraint –  
no one is currently **using** 45 MHz

AT&T has 35 MHz in NYC (and other markets) but has  
only built out 25 MHz

Verizon has 45 MHz, but they have constructed only 25  
MHz <sup>1</sup>

Carriers need efficiency, not more spectrum

<sup>1</sup> Declaration by Schwartz and Gale, WT Docket No. 01-14



# Need the spectrum caps today more than ever

Without the cap, carriers can warehouse spectrum to avoid competition and network upgrades.

Removing the cap would result in consolidation and elimination of companies like Leap and significant reduction in competition.<sup>2</sup>

Competition is lukewarm in the top 25 markets. There are multiple providers but similar offerings targeting "high end" users. This service/price is unattractive to 61% of consumers.

If 2/3rds of the population is admittedly underserved where is the competition that is supposedly inherent with having four or five carriers in one market?

<sup>2</sup> "Carrier Consolidation Coming," Forbes.com, October 5, 2001



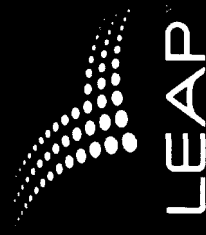
# Spectrum Cap ensures that FCC goals are met

Competition

Innovation

Spectrum Efficiency

“Cutting the Cord”



# Spectrum Cap=Competition

Consumer's Union and Consumer's Federation attest to the consumer benefits of the spectrum cap being maintained.

Up to 2/3 of the US population is under penetrated by the wireless market.

The cost of wireless services has dropped on average 37% in the markets where Leap has introduced its innovative Cricket flat-rate service.



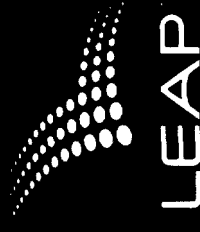
# Spectrum Cap=Innovation

Competition encourages the more rapid innovation of new technologies and services better tailored to consumer needs.

Flat-rate plans, such as Leap's, offer subscribers affordable and predictable monthly charges, but have not yet been offered by the traditional providers.

The spectrum cap has brought new customers to wireless

88% of new Cricket customers are completely new to wireless or coming back after a long-term disconnect.



# Spectrum Cap= Spectrum Efficiency

Spectrum is a limited resource and its scarcity skews the market. Without the cap, carriers can warehouse spectrum to avoid competition and network upgrades.

Efficiently utilized, 45 MHz is adequate spectrum for any wireless communications provider.

The spectrum cap does nothing to limit the number of subscribers that can be on a particular carrier's network.

Network owners always have the option to grow subscribership by switching to an all-digital network and using digital compression to boost service capacity by several orders of magnitude.

For instance, one national carrier maintains nearly 50% of its customers on analog technology, yet the spectrum it takes to accommodate a single minute of analog use could accommodate 24 minutes on a more efficient network.



LEAP

# Spectrum Cap= "Cutting the Cord"

The Spectrum Cap allows innovative development of alternatives to local landline phone service.

Affordable wireless is effectively competing with local wire line-based services with the spectrum cap in place:

57% of Cricket customers use their wireless service as their primary phone

20% of Cricket customers decided to get their Cricket phone instead of purchasing an additional landline phone

5% of Cricket customers cancelled a landline phone when they purchased their Cricket service

